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this Memorandum Decision shall not be
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collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

ALBERT W. HORNER,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 91A02-0509-CR-903

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-9709-CF-128

March 1, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Albert W. Horner appeals the denial of his petition for post-conviction relief. He raises three issues for our review, which we restate as whether he was unconstitutionally denied counsel during the post-conviction proceedings; whether the post-conviction court erred in ruling without a hearing; and whether Horner's underlying convictions were supported by sufficient evidence. Concluding the post-conviction court properly denied the petition, we affirm.

Facts and Procedural History

On May 12, 1990, Horner was sentenced to an aggregate sentence of fifty years following his convictions for burglary, a Class A felony, criminal deviate conduct, a Class B felony, and attempted rape, a Class B felony. Horner's convictions and sentence were affirmed in an unpublished memorandum decision. Horner v. State, No. 91A04-9806-CR-327 (Ind. Ct. App. July 23, 1999) trans. denied.

On June 2, 2000, Horner filed a Verified Petition For Post-Conviction Relief ("PCR petition"). The post-conviction court determined Horner was indigent and ordered a copy of the PCR petition to be sent to the Office of the Public Defender. On June 26, 2000, Horner's appointed counsel filed an appearance and a Verified Notice of Current Inability To Investigate. The court acknowledged the notice and ordered the matter be set for hearing when Horner's counsel notified the court of his ability to proceed. On June 29, 2000, the State filed its Answer to the PCR petition.

Later, on January 28, 2004, the Deputy State Public Defender filed a Motion to

Withdraw Appearance of the State Public Defender indicating that Horner no longer desired the assistance of the Public Defender's Office and was electing to proceed pro se. On that same day, Horner filed a request for evidentiary hearing and for issuance of subpoena.

On February 4, 2004, the post-conviction court granted the Motion to Withdraw Appearance of the State Public Defender upon Horner's election to proceed pro se. The court ordered that the matter would proceed upon submission of affidavits. An evidentiary hearing was set for April 26, 2004. The court further granted both Horner and the State time to submit summary dispositive motions or affidavits. The court took under advisement Horner's request for the issuance of a subpoena pending the submission of an affidavit specifically stating the reason the witness' testimony was required and the substance of the witness' expected testimony.

On February 27, 2004, Horner filed affidavits in support of his request for issuance of subpoenas to his trial counsel, Robert H. Little and Rebecca Trent. Horner represented that they were expected to testify about not pursuing a plea agreement for Horner and not allowing Horner to discuss with the White County Prosecutor the possibility of the plea agreement. Horner also submitted affidavits requesting the appearance of Department of Correction personnel. The court refused to issue the requested subpoenas.

On August 26, 2005, the post-conviction court denied Horner's PCR petition. Horner now appeals that denial arguing that the court erred in denying his PCR petition, and raising three issues for our review: 1) whether he was unconstitutionally denied the assistance of counsel; 2) whether the post-conviction court appropriately dismissed his PCR petition

without a hearing; and 3) whether he waived his claims that his convictions were supported by sufficient evidence.

Discussion and Decision

I. Standard of Review

The petitioner bears the burden of establishing his grounds for post-conviction relief by a preponderance of the evidence. Henderson v. State, 825 N.E.2d 983, 985 (Ind. Ct. App. 2005), trans. denied. To succeed on appeal from denial of post-conviction relief, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite the one reached by the post-conviction court. Johnson v. State, 832 N.E.2d 985, 991 (Ind. Ct. App. 2005), trans. denied.

When reviewing the denial of a petition for post-conviction relief, we do not weigh the evidence or judge the credibility of the witnesses. Thompson v. State, 796 N.E.2d 834, 838 (Ind. Ct. App. 2004), trans. denied. We will conclude that a post-conviction court's decision is contrary to the law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Id.

II. Assistance Of Counsel

Horner claims he was unconstitutionally denied counsel during his post-conviction proceedings. However, the State is not required to provide counsel during a post-conviction proceeding. Howard v. State, 581 N.E.2d 925, 926 (Ind. 1991). Moreover, Horner was provided with the opportunity to be represented at post-conviction proceedings by court-appointed counsel. In fact the State Public Defender's Office entered an appearance and

filed its “Verified Notice of Current Inability To Investigate” and Horner was advised of counsel’s current inability to investigate. The motion was granted by the court and the matter was to be set for hearing when Horner’s counsel notified the court of his ability to proceed. Thereafter, the State Public Defender’s Office withdrew because Horner no longer desired its assistance, had elected to proceed pro se, and clearly understood that waiving the Public Defender’s assistance meant the loss of the right of their representation for the duration of his case. A petitioner expressly informing the post-conviction court that he does not wish the assistance of counsel cannot later cry foul because the court abided by his wishes. Id. As Horner requested his appointed counsel to withdraw and elected to represent himself, we conclude that Horner was not denied the opportunity to be represented by counsel in post-conviction proceedings.

III. Evidentiary Hearing

Horner asserts the post-conviction court erred in denying his PCR petition without granting his requests for subpoenas and without a hearing. Horner asserts an evidentiary hearing was required because his affidavits presented factual issues regarding whether his trial counsel rendered ineffective assistance. Horner points out that he complied with Indiana Post-Conviction Rule 1(9)(b)’s requirements for requesting the issuance of subpoenas for his witnesses by filing affidavits setting forth the substance of the expected testimony. He asserts he was entitled to a hearing pursuant to Indiana Post-Conviction Rule 1(4)(g) because the affidavits submitted show an issue of fact, pursuant to Fuquay v. State, 689 N.E.2d 484, 486 (Ind. Ct. App. 1997) trans. denied, and Hamner v. State, 739 N.E.2d 157 (Ind. Ct. App.

2000).

However, we addressed this issue in Smith v. State, 822 N.E.2d 193 (Ind. Ct. App. 2005), trans. denied. As in Smith, we cannot accept the assertion that a hearing is required merely because the affidavits submitted present issues of fact. “Factual statements in affidavits often raise issues of fact, and to require a full evidentiary hearing any time affidavits submitted under Rule 1(9)(b) create issues of fact would defeat the purpose of Rule 1(9)(b), which is to allow for more flexibility in both the presentation of evidence and the review of post-conviction claims where the petitioner proceeds pro se.” 822 N.E.2d at 201. Thus, where the post-conviction court orders the parties to proceed by affidavit under Rule 1(9)(b), as in the instant case, the decision whether to hold an evidentiary hearing is best left to the post-conviction court’s discretion. Id. We will review the post-conviction court’s decision to forego an evidentiary hearing when affidavits have been submitted pursuant to Indiana Post-Conviction Rule 1(9)(b) under an abuse of discretion standard. Id.

In this case, Horner filed affidavits in support of his request for issuance of subpoenas for his trial counsel and for Department of Correction personnel. He set forth that “Mr. Little’s testimony is required ... because it goes to the Ineffective [assistance] claims that Horner is trying to establish and if Little had pursued [sic] a plea agreement for Horner he would not have received as harsh a sentence.” Appellant’s Appendix at 44. Further, with regard to Ms. Trent, Horner’s affidavit set forth that “Ms. Trent’s testimony is required ... because it will establish Ho[r]ner’s Ineffective claims and failure to pursue a plea agreement.” Id. at 52. Neither of the affidavits specifically explains what sort of plea

bargain Horner might have been able to have if not for the alleged ineffectiveness of Little and Trent or specifies the alleged deficiencies of Little and Trent's representation. Horner's affidavits in support of his motion for the issuance of subpoenas are merely general assertions and lack the necessary specificity. The post-conviction court has discretion to determine whether to grant or deny a petitioner's request for a subpoena. Allen v. State, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), trans. denied. Horner has failed to identify any specific facts or present any argument as to how the representation by his counsel was deficient or how the result of his proceedings would have been different. Thus, Horner does not show error by the post-conviction court in refusing to issue the requested subpoenas or in failing to hold an evidentiary hearing.

IV. Remaining Claims

Horner seeks to challenge to his underlying convictions and sentence by asserting error in the admission at trial of photographs of the victim, insufficiency of the evidence presented at trial, and improper jury instructions. However, post-conviction proceedings are not "super-appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. Douglas v. State, 800 N.E.2d 599, 604 (Ind. Ct. App. 2003) trans. denied. Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Id. Horner could have raised these issues in his direct appeal. Because these claims were available at the time of direct appeal, they are not available to Horner on post-conviction review. Id.

Conclusion

Because all of Horner's arguments fail, the court's denial of his petition for post-conviction relief was not contrary to law. Accordingly, we affirm.

Affirmed.

BAKER, J., and DARDEN, J., concur.